

STATE OF MICHIGAN

In the Supreme Court

Appeal from the Michigan Court of Appeals

Hon. Peter D. O'Connell, Presiding Judge

COUNTY OF WAYNE,
Plaintiff/Appellee

Supreme Court Nos. 124070-124078

Court of Appeals
Nos. 239438, 239563
240184, 240187, 240189
240190 and 240193-240195

EDWARD HATHCOCK, *et al*
Defendant/Appellant,

**BRIEF AMICUS CURIAE OF THE ECONOMIC
DEVELOPMENT CORPORATION OF THE CITY OF DETROIT,
CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY
AND THE MICHIGAN DOWNTOWN AND FINANCING ASSOCIATION**

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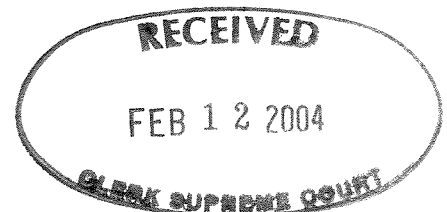


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STATEMENT OF QUESTIONS PRESENTED

I. DOES WAYNE COUNTY HAVE THE AUTHORITY, PURSUANT TO MCL §213.23 OR OTHERWISE, TO TAKE DEFENDANTS' PROPERTIES?

Wayne County answers “Yes”

Defendants-Appellants answer “No”

The trial court answered “Yes”

The Court of Appeals answered “Yes”

Amicus Curiae Detroit EDC, Detroit DDA and MDFA take no position.

II. ARE THE PROPOSED TAKINGS, WHICH ARE AT LEAST PARTLY INTENDED TO RESULT IN LATER TRANSFERS TO PRIVATE ENTITIES, FOR A “PUBLIC PURPOSE” PURSUANT TO *POLETOWN NEIGHBORHOOD COUNCIL v DETROIT*, 410 MICH 616 (1981)?

Wayne County answers “Yes”

Defendants-Appellants answer “No”

The trial court answered “Yes”

The Court of Appeals answered “Yes”

Amicus Curiae Detroit EDC, Detroit DDA and MDFA do not answer this specific question, but answer in general “Yes”

III. SHOULD *POLETOWN* BE OVERRULED BECAUSE THE “PUBLIC PURPOSE” TEST SET FORTH IN IT IS INCONSISTENT WITH CONST 1963, ART 10, §2?

Wayne County answers “No”

Defendants-Appellants answer “Yes”

The trial court did not answer

The Court of Appeals did not answer

Amicus Curiae Detroit EDC, Detroit DDA and MDFA answer “No”

IV. SHOULD ANY DECISION OVERRULING *POLETOWN* BE APPLIED RETROACTIVELY?

Wayne County answers “No”

Defendants-Appellants answer “Yes”

The trial court did not answer

The Court of Appeals did not answer

Amicus Curiae Detroit EDC, Detroit DDA and MDFA answer “No”

INTRODUCTION

A. Interest of the Parties *Amicus Curiae*

The Economic Development Corporation of the City of Detroit (“Detroit EDC”) and the City of Detroit Downtown Development Authority (“Detroit DDA”) are instrumentalities of the City of Detroit, formed pursuant to state statutes enacted to alleviate unemployment, address urban deterioration, and foster economic revitalization. Their respective enabling statutes authorize the taking of private property by the City of Detroit for use by the Detroit EDC or the Detroit DDA, as applicable, in an authorized project. The Detroit EDC was a defendant in the case of *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981), addressed herein. The Michigan Downtown and Financing Association (“MDFA”) is a statewide organization formed to encourage urban development, redevelopment and improvement of cities and towns, with special emphasis on downtown areas. Its membership includes downtown development authorities, local officials, tax increment financing authorities, engineering and consulting firms, and other persons and organizations within the State of Michigan that support economic development.

Based upon their missions, the Detroit EDC, the Detroit DDA, and the MDFA have an interest in the determination of the questions to be addressed by this Court. The ability of these organizations to fulfill their legislatively appointed missions will be seriously compromised were this Court to overrule the *Poletown* decision. For the reasons set forth below, they therefore offer this brief as *amicus curiae*.

B. Why the *Poletown* Decision Should Not be Overruled

The Detroit EDC, the Detroit DDA, and the MDFA believe that there are five principal reasons why this Court should not use the case of *County of Wayne v Hathcock*, an unpublished *per curiam* Court of Appeals opinion issued April 24, 2003 (Docket Nos. 239438, 239563, 240184, 240187, 240189, 240190, 240193, 240194, 240195), to overrule its *Poletown* decision.

The first four of the five reasons are found in *Pohutski v City of Allen Park*, 465 Mich 675, 693; 641 NW2d 219, 231 (2002). The *Pohutski* court, addressing the issue of *stare decisis*, cited the four factor test for overruling a prior decision, adopted in *Robinson v Detroit*, 462 Mich 439, 464; 413 NW2d 307 (2000):

1) whether the earlier case was wrongly decided, 2) whether the decision defies “practical workability,” 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision.

Application of these four criteria compels the conclusion that *Poletown* should not be overruled.

1. ***Poletown* was not wrongly decided.** As discussed, *infra*, in response to Question 3 under the caption “The *Poletown* Decision,” the *Poletown* decision followed principles enunciated in long-standing Michigan precedent and was not wrongly decided.

2. ***Poletown* does not defy “practical workability.”** As discussed, *infra*, in response to Question 3 under the caption “Post-*Poletown* Applications of Public Purpose Test,” the *Poletown* decision has largely been followed correctly by Michigan courts.

3. **Reliance interests would work an undue hardship if *Poletown* were to be overruled.** As discussed *infra*, in “The EDC Act and Similar Statutes,” overruling the

Poletown decision would not merely overturn a single judicial precedent. It would invalidate the use of condemnation as a tool for alleviating unemployment and urban deterioration and fostering economic revitalization in Michigan. This tool is found in at least five statutes enacted by the Michigan Legislature from 1975 through 1996 for those express purposes. Municipalities have relied on these statutes, including the condemnation provisions provided therein, in order to fulfill public purposes declared by the legislature. Michigan's aging industrial economy continues to lag behind that of the nation.¹ Overruling *Poletown* would take away a valuable tool to alleviate unemployment and urban deterioration and foster economic revitalization, on which Michigan municipalities have relied since 1975.

4. There are no changes in the law or facts that would justify overruling *Poletown*. Rather, as indicated, *infra*, in response to Question 3 under the caption "The EDC Act and Similar Statutes," the Michigan Legislature has passed four statutes since the Economic Development Corporations Act, MCL §125.1601 *et seq.* (the "EDC Act"), at issue in *Poletown*, which would permit activities of the type upheld in *Poletown*. While the economic exigencies faced by Detroit at the time of the *Poletown* decision were extreme, recent information, cited *supra*, indicates that Michigan's economy continues to struggle and the State continues to need tools such as those the legislature provided in adopting the EDC Act and similar statutes.

5. The *Hathcock* case does not address the same issue as did *Poletown*. The *Poletown* case addressed the constitutionality of a condemnation action pursuant to the EDC

¹ As reported by the Michigan Department of Labor and Economic Growth on December 17, 2003, Michigan's unemployment increased 17.7% over the prior year, as compared with .4% for the nation, the 36th consecutive month that Michigan unemployment rate was above the national rate. Employment declined by 43,000 from January through November 2003.

Act, a comprehensive state legislative program with the express purpose of addressing unemployment and revitalizing the economy of Michigan. The EDC Act authorized condemnation by the City of Detroit to achieve that purpose.

The *Hathcock* case concerns a taking based upon the general powers of Wayne County under 1911 PA 149, as amended, MCL §213.21 *et seq.*, captioned “Acquisition of Property of State Agencies and Public Corporations” (the “Condemnation Statute”). This statute contains no statement of public purpose for the condemnation, such as that found in the EDC Act. The constitutionality of no state statute is at issue in *Hathcock*. Because *Hathcock* and *Poletown* contain the factual similarity of ultimate use of the condemned property by a private party, the principles enunciated in *Poletown* might provide guidance in deciding *Hathcock*. However, because *Hathcock* does not concern the constitutionality of a state statute and condemnation in furtherance of a public purpose articulated by the Michigan Legislature, *Poletown* should not have formed the basis of the *Hathcock* decision. The ease with which the *Poletown* case is distinguishable from *Hathcock* makes it unnecessary to revisit the constitutional validity of *Poletown* to decide the *Hathcock* case and militates against any consideration of a constitutional attack on *Poletown* in this context.

STATEMENT OF FACTS

The facts of the *Hathcock* case have been set forth by the parties and are therefore not repeated in detail herein. For purposes of this brief, the critical facts of *Hathcock* are as follows:

1. Wayne County condemned land adjacent to Detroit Metropolitan Wayne County Airport under authority of a locally adopted Resolution of Necessity and the Condemnation Statute, MCL §213.21 *et seq.*, a statute of general

applicability.

2. The Condemnation Statute, unlike the EDC Act at issue in *Poletown*, contains no explicit statement of public purpose and necessity for the taking.
3. The condemned property was to be the site of Pinnacle Aeropark, a combined technology and industrial park, business center, hotel, and conference center. Specific tenants of the park had not been identified by Wayne County at the time of the taking.
4. The County's purpose for the project was to generate jobs, expand its tax base beyond its largely industrial character, and improve the County's image.
5. The project was also conceived as a means of making productive use of certain lands adjacent to Detroit Metropolitan Wayne County Airport, which the County had acquired pursuant to a federal noise reduction program in connection with airport expansion.

STANDARD OF REVIEW

The Supreme Court applies *de novo* review when reviewing the constitutionality of a statute or statutory construction. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163, 166 (2001); *McAuley v General Motors Corporation*, 457 Mich 513, 518; 578 NW2d 282, 285 (1998).

SUMMARY OF ARGUMENT

The *Poletown* decision should not be overruled because it was correctly decided and is consistent with Michigan eminent domain law, it has largely been applied correctly in subsequent cases, it has been an integral element in state economic development legislation in effect for 30 years, and *Hathcock* is not an appropriate case in which to determine the

validity of *Poletown*.

Settled principles of Michigan eminent domain law, followed by *Poletown*, require that the taking be for a public purpose, necessary, and for the use or benefit of the public. Public purpose is a state legislative determination, subject to judicial review only for abuse of discretion. The public purposes at issue in *Poletown*, alleviation of unemployment and fostering economic development, were determined by the Michigan Legislature in the EDC Act. In a case such as *Poletown*, where there is an element of private benefit, the role of the court is to scrutinize the evidence in order to ascertain whether the condemnation is truly necessary and for the benefit or use of the public, so as to legitimately be within the public purpose. The EDC Act, requiring multiple public determinations of necessity and public use or benefit, after receipt of public input, led the *Poletown* court to conclude that necessity and public benefit had been found, despite the presence of incidental private benefit. Overruling *Poletown* would not merely overturn a judicial precedent, but would invalidate condemnation provisions essential to several statutes, similar to the EDC Act, on which struggling Michigan municipalities rely.

Poletown did not develop a new test, but applied well-settled principles in the context of the public purpose declared by the legislature in the EDC Act. Michigan courts have applied *Poletown* in a conservative and judicious manner, rarely upholding condemnation involving an element of private benefit, unless the elements of public purpose, necessity, and public use or benefit are demonstrated. If, however, public purpose is based upon a local determination rather than upon a declaration of public purpose contained in a state statute, such as the EDC Act, *Poletown* is inapposite. Rather, a more stringent test was developed by this Court in a subsequent case. That test, not *Poletown*, should have been applied in

Hathcock. *Hathcock* is therefore not the proper case in which to assess the validity of *Poletown*.

ARGUMENT

I. WHETHER THE COUNTY OF WAYNE HAS THE AUTHORITY, PURSUANT TO MCL §213.23 OR OTHERWISE, TO TAKE DEFENDANTS' PROPERTIES.

As *amicus curiae*, the Detroit EDC, the Detroit DDA, and the MDFA assert no interest in the determination of the above question and therefore do not address this question herein.

II. TAKINGS WHICH ARE AT LEAST PARTLY INTENDED TO RESULT IN LATER TRANSFERS TO PRIVATE ENTITIES MAY, UNDER CERTAIN CIRCUMSTANCES, BE FOR A "PUBLIC PURPOSE" PURSUANT TO *POLETOWN*.

The Detroit EDC, the Detroit DDA, and the MDFA, as *amicus curiae*, take no position as to whether the specific takings at issue in *Hathcock* are for a public purpose pursuant to *Poletown*. As will be discussed, *infra*, the *Poletown* case is not dispositive in *Hathcock* because the actions in *Hathcock* were not taken pursuant to a comprehensive state statute containing a declaration of public purpose and necessity for the condemnation and providing for a series of local determinations to ensure public benefit. However, we do address the general question of whether takings which are at least partly intended to result in later transfers to private entities may be for a "public purpose" pursuant to *Poletown*. We answer this question in the affirmative, in the circumstances described in "Relevant Law," *infra*.

A. Relevant Law

Const 1963, art 10, §2 states: “Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.”

The Condemnation Statute operationalizes this constitutional provision, setting forth the statutorily prescribed criteria for condemnation by public corporations and state agencies.

Section 3 of that act, MCL §213.23, states in relevant part: “Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose.”

In the context of condemning property for a public purpose which entails later transfer to a private entity to fulfill that purpose, the above language requires satisfaction of three tests before condemnation by a public corporation or a state agency is allowed:

- 1) The taking must be necessary.
- 2) The taking must be for a public purpose within the scope of the powers of the condemning authority.
- 3) The taking must be for the use or benefit of the public.²

Pursuant to *Poletown* and prior precedent discussed, *infra*, deference is due by courts

² Michigan courts have been imprecise in their use of the terms “public purpose,” “public use,” and “public benefit.” While the *Poletown* court equated “public use” with “public purpose,” it spoke separately of “public benefit.” *Poletown, supra*, at 629-630; 304 NW2d at 457. The *Poletown* court’s language may differ from the Condemnation Statute; nevertheless, the *Poletown* decision, as discussed, *infra*, separately addresses public purpose, necessity, and public use or benefit.

to state legislative determinations of public purpose.³ Therefore, if the taking of the particular piece of property is for a legislatively determined public purpose, it may be permissible despite the prospect of subsequent transfer to a private party in order to realize that purpose.

However, when achievement of the public purpose may lead to later transfer of the property to a private entity, *Poletown* requires that the court apply “heightened scrutiny” in determining whether the proposed action is within the scope of the legislatively declared public purpose. If the court finds that the taking of the particular piece of property is necessary to achieve the public purpose, the public benefit is clear and significant, and the private benefit is merely incidental to the public benefit, the action is deemed to be within the contemplation of the legislative purpose and is therefore permissible. *Poletown, supra*, at 634-635; 304 NW2d 459-460.

B. Roles of Legislature and Courts in Analyzing Public Purpose in Michigan Cases

The *Poletown* court envisioned a narrow role for the court after a state legislative determination that the contemplated action is of a type that serves an “essential public purpose.” *Id.* at 632; 304 NW2d at 458. “The Court’s role after such a determination is made is limited.” *Id.* The role of the court is to apply “heightened scrutiny” to determine the public benefit is “clear and significant,” so as to be within the legislatively determined public purpose, or whether it is “speculative or marginal.” *Id.* at 634-635; 304 NW2d at 459-460.

Additionally, the court, in keeping with the constitutional requirement of substantive due process, can reverse a legislative determination that is “palpable and manifestly arbitrary

³ As will be discussed, *infra*, *Hathcock* involved no state legislative determination of public purpose and is therefore not properly governed by *Poletown* despite superficial factual similarities.

and incorrect.”” *Id.* at 632; 304 NW2d at 459, quoting *Gregory Marina, Inc. v Detroit*, 378 Mich 364, 396; 144 NW2d 503 (1966). *See also, Hawaii Housing Authority v Midkiff*, 467 US 229; 104 S Ct 2321; 81 L Ed2d 186 (1984), discussed, *infra*.

This view of appropriate legislative and judicial roles in analyzing public/private benefit in a given condemnation action is well supported by decisions of both this Court and the U.S. Supreme Court. Under Michigan decisions, a determination of public purpose is a legislative function which is subject to judicial review only for abuse of discretion. The general principle was articulated in *Swan v Williams*, 2 Mich 427 (1852):

The power of the government respecting public improvements is a sovereign power. It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion Courts will not interfere. [citation omitted]. *Id.* at 438.

The requirement that the legislature determine public purpose has its basis in the legal underpinnings of the power of eminent domain, discussed, *infra*, in response to Question 3, under the caption “ Principles of Eminent Domain in Early Michigan Jurisprudence, Public Purpose Within the Scope of Powers.”

Subsequent decisions have followed this principle. In *In re Brewster Street Housing Site in the City of Detroit*, 291 Mich 313; 289 NW 493 (1939), this Court was asked to determine the constitutionality of state legislation allowing condemnation for both slum clearance and public housing projects. The statute explicitly declared the housing projects to be a public purpose within the meaning of ““constitution, state laws and charters relative to the power of eminent domain.”” *Id.* at 324; 289 NW at 497 (1939), quoting the statute at issue. The *Brewster Street Housing* court saw a limited role for the court based upon the power of the legislature under Michigan’s constitution: “All presumptions are in favor of the

constitutionality of the legislation and before it may be declared unconstitutional, it is necessary to point out the limitation upon the power of the legislature which the legislation in question transcends.” *Id.* at 335-336; 289 NW at 501. The court affirmed the constitutionality of the statute.

This principle was concisely stated several years later in *Petition of City of Detroit (Airport Site)*, 308 Mich 480; 14 NW2d 140 (1944), where the right of the City of Detroit to condemn land in a neighboring township for an airport was challenged. A state statute delegated to cities the right to use the power of condemnation to establish airports. The court stated: “The power of eminent domain is inherent in State sovereignty. [citation omitted]. Subject to constitutional restrictions, it is entirely under control of the legislature.” [citation omitted]. *Id.* at 484; 14 NW2d at 142. This Court held that the township could not dismiss the city’s petition to condemn land for the airport.

The court followed the same approach in *Michigan State Highway Commission v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974), a case involving condemnation of land by the Michigan State Highway Commission for road purposes under authority of the Highway Condemnation Act. That act granted to the Highway Commission the authority to determine the necessity for taking particular land for an approved highway purpose. The necessity for the taking for the purpose specified by the Highway Commission was reviewable by a court. In determining whether the review for necessity applied only to the taking of the particular property or to the road improvement in general, this Court held that the “purpose” was the decision to make the general improvement, in that case the widening of U.S. 24, and found “there can be no judicial review of the decision to make such an ‘improvement.’” *Id.* at 176; 220 NW2d at 423. Only the necessity for taking the particular parcel was reviewable.

Id.

Michigan decisions do, however, provide a role for the courts in statutory interpretation in condemnation cases: determining whether the proposed action is within the legislative authorization. This is the essence of *Poletown's* heightened scrutiny: “[s]uch public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the legislature.” *Id.* (emphasis added).

Where Michigan decisions have stated that public use is a judicial determination, this statement has been made in the context of an unquestioned public purpose. The public use analysis addressed whether the proposed activity was within the scope of the legislatively declared purpose. *See, e.g., Cleveland v City of Detroit*, 322 Mich 172; 33 NW2d 747 (1948) and *Lakehead Pipe Line Co. v Dehn*, 340 Mich 25; 64 NW2d 903 (1954). In *Cleveland, supra*, plaintiff had alleged that the City of Detroit was condemning more land than needed to build a city street railway. The street railway was authorized by a city charter provision enacted pursuant to a state statute which specifically authorized city charter provisions allowing for acquisition by condemnation for transportation purposes. Despite the court’s declaration that “[t]he question of whether the proposed use is a public use is a judicial one,” the court acknowledged the “avowed public purpose” of the street railway. *Id.* at 179; 33 NW2d at 750. The court’s analysis was an attempt to ascertain if the proposed taking was within the scope of the stated public purpose or if the amount of property sought to be acquired was in excess of that needed in fulfillment of the public purpose. *Id.* at 177; 33 NW2d at 751.

Lakehead Pipe Line, supra, involved condemnation by an oil company for an oil pipeline pursuant to state law. Among other things, it was alleged that because the oil

company would profit from the pipeline, condemnation was for a private rather than a public purpose. While the court quoted *Cleveland, supra*, regarding the necessity for a judicial determination of public use, it never questioned the purpose of the pipeline legislation, stating, “That such transportation and delivery [of oil] in interstate commerce will result in benefits to Michigan is scarcely open to question.” *Id.* at 36; 64 NW2d 910. What concerned the court in *Lakehead Pipe Line* was the relative degree of public and private benefit to be received.

In language prescient of *Poletown*, the *Lakehead Pipe Line* court stated:

Doubtless the Imperial Oil company will be benefited by the fact that the pipe line system provides a method for transporting its oil to the refineries. It cannot be said, however, that, because of such situation, the plaintiff is seeking to exercise the power of eminent domain for a private purpose. The private benefit, if such there is, is merely incidental to the main purpose. The fact that a stockholder in a corporation engaged in the transportation for hire of persons or property, or both, may receive some benefit from the earnings of the carrier does not vitiate the action of the State in delegating to such carrier the power to condemn property for its necessary public uses, nor may it be given the effect in any such instance of barring the exercise of such power. *Id.* at 40; 64 NW2d at 911.

The court upheld the condemnation. *Id.* at 42; 64 NW2d at 912.

While courts may sometimes be inexact in their use of particular terms, the principle gleaned from a review from the cases is clear: in analyzing condemnation actions, it is important to distinguish between the public purpose and the mechanism for achieving that purpose. If the underlying purpose is a public one, the mechanism used to achieve that public purpose may involve transfer of property to a private entity. The purpose, not the mechanism, is the starting point of the constitutional analysis.

In the *Poletown* case, the purposes, as declared by legislature, were alleviation of unemployment and economic revitalization. One mechanism for achieving these purposes, the legislature had said, was condemnation of land and subsequent transfer of the land to a

private party. The purpose was not transfer of land to a private party, although a private party, General Motors, would admittedly benefit from the condemnation. The *Poletown* court, in keeping with prior precedent, discussed *supra*, assessed whether the condemnation was truly for the public purposes of alleviating unemployment and economic revitalization. The court examined whether the subsequent transfer and related benefit to General Motors were not merely the means of achieving a public purpose but, under the guise of public purpose, were really the true purposes of the condemnation. The *Poletown* court, like the *Cleveland* court and the *Lakehead Pipe Line* court, discussed, *supra*, did not second-guess the legislatively declared purpose. Under the evidence presented to the *Poletown* court, it found that the taking was indeed for the legislatively declared purpose and that the subsequent transfer to General Motors was only a means of fulfilling that purpose.

In sum, under Michigan law, takings for a legislatively declared public purpose, which may result in later transfers to private entities in fulfillment of that purpose, are not *per se* constitutionally deficient. While not explicitly stating so, the *Poletown* case applied the test set forth in the Condemnation Statute in making this determination, as described, *infra*, in response to Question 3. The test assumes distinct roles for the legislature and the courts: the legislature determines public purpose and, particularly where private benefit is involved, the court scrutinizes the proposed means of fulfilling that purpose to determine if it can be legitimately viewed as lying within the purview of the stated purpose.

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C. Roles of Legislature and Courts in Analyzing Public Purpose in U.S. Supreme Court Cases

The U.S. Supreme Court has held that great deference is due to legislative determinations of public purpose. This has been particularly true since the 1954 decision of *Berman v Parker*, 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954). That case addressed the constitutionality of the District of Columbia Redevelopment Act of 1945, as applied to the taking of the defendant's property. In that act, Congress authorized the condemnation of property to eliminate substandard housing in blighted areas. Real estate so condemned could be sold or leased to a private party for redevelopment pursuant to a project area redevelopment plan. The authorized acquisition and conveyance of property had been determined by Congress to be a public use. *Id.* at 29. A department store owner challenged the taking of his property pursuant to that act. The *Berman* court upheld the action, declaring in now well-known language:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citation omitted] or states legislating concerning local affairs. [citations omitted]. This principle admits no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. *Id.* at 32.

Declining to even engage in statutory interpretation, the Court continued, "We do not sit to determine whether a particular housing project is or is not desirable. The concept of public welfare is broad and inclusive." *Id.* at 33. The court further stated "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*

While Justice Ryan dismissed the *Berman* case as standing for “minimal judicial review of acts of Congress by federal courts,” *Poletown, supra*, at 668; 304 NW2d at 475 (Ryan, J., dissenting), the U.S. Supreme Court expanded *Berman*’s analysis to encompass judicial review of the constitutionality of a state statute in *Hawaii Housing Authority v Midkiff*, 467 US 229; 104 S Ct 2321; 81 L Ed 2d 186 (1984). *Midkiff*, decided after *Poletown*, concerned the constitutionality of Hawaii’s Land Reform Act of 1967, which authorized condemnation in order to diminish concentration of land ownership, which the legislature concluded was artificially inflating residential land prices. *Id.* at 232. Like *Berman*, the case involved the Fifth Amendment to the U.S. Constitution. That amendment, like Const 1963, art 10, §2, prohibits taking of private property for public use without just compensation. Unlike *Berman*, the constitutionality of a state rather than a federal legislative statute was at issue in *Midkiff*. Again, the Court refused to second-guess a legislative determination regarding public use.⁴ Writing for a unanimous Court (Justice Marshall not participating), Justice O’Connor reiterated the narrow judicial role prescribed by the *Berman* Court: “In short, the court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’” [citation omitted]. *Midkiff, supra*, at 241. The Court rejected the notion that property transferred to private beneficiaries “condemn[ed] the taking as having only a private purpose.” *Id.* at 233. The Court cited an earlier case to the effect that “‘it is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.’” *Id.* at 244, quoting *Rindge Co. v Los Angeles*, 262 US 700, 707; 43 S Ct 689; 67 L Ed 1186 (1923).

⁴ In *Midkiff*, the terms “public use” and “public purpose” are used interchangeably.

The U.S. Supreme Court, in cases construing the constitutionality of both federal and state legislation under the Fifth Amendment to the U.S. Constitution, has accepted a legislative determination of public purpose as the basis for condemnation actions. The Court has not questioned the use of condemnation that is rationally related to a public purpose declared by the legislature, even where there is substantial private use. Because Const 1963, art 10, §2 contains virtually identical language to that of US Const, Am V, *Berman* and *Midkiff* provide valuable guidance in interpreting the Michigan Constitution in a situation where actions taken in fulfillment of a public purpose involve an element of private benefit.

III. THE “PUBLIC PURPOSE” TEST SET FORTH IN *POLETOWN* IS CONSISTENT WITH CONST 1963, ART 10, §2, AND SHOULD NOT BE OVERRULED.

The “public purpose” test in *Poletown* is consistent with Const 1963, art 10, §2 and prior Michigan eminent domain law. As discussed, *infra*, *Poletown* did not develop a new test, but applied the test set forth in the Condemnation Statute. Because the *Poletown* court applied that test in the context of the EDC Act, it spoke to the safeguards needed to ensure constitutional compliance with respect to actions authorized under that act. The *Poletown* decision, often applied in decisions other than determination of the constitutionality of a state statute, has nevertheless been followed in a conservative and judicious manner in subsequent cases. Application of the principles of *Poletown* has rarely authorized condemnation when private benefit is involved and enables Michigan courts to assess the legality of the use of eminent domain in the face of changing societal needs. Subsequent decisions substantially address the concerns expressed in Justice Ryan’s *Poletown* dissent that the decision will lead to undue infringement upon the rights of private property owners. *Poletown*, *supra*, at 684; 304 NW2d at 482 (Ryan, J., dissenting). As discussed, *infra*, *Poletown* lies squarely within

Michigan eminent domain jurisprudence.

A. Principles of Eminent Domain in Early Michigan Jurisprudence

Despite the assertion in Justice Ryan’s *Poletown* dissent that “this case so remarkably alters our jurisprudence” the *Poletown* decision is, in fact, well supported by prior Michigan law. *Id.* at 646; 304 NW2d at 465 (Ryan, J., dissenting). These cases address the three statutory requirements discussed in response to Question 2 under the caption “Relevant Law”: public purpose within the scope of the condemning authority’s powers, necessity, and public use or benefit.⁵

1. Public Purpose Within the Scope of Powers

The requirement that the taking be for a public purpose within the scope of the condemning authority’s power speaks to the legal underpinnings of the power of eminent domain. This Court, in *Petition of the City of Detroit (Airport Site)*, *supra*, succinctly described these roots as follows: “The power of eminent domain is inherent in state sovereignty.” 308 Mich 484; 14 NW2d at 142 (1944). This principle was enunciated more expansively in earlier Michigan jurisprudence. In *Swan*, *supra*, the court described the roots of eminent domain as follows:

The term “good government,” embraces within its scope, the whole range of Legislation necessary to secure the comfort, prosperity and happiness of a people; and the authority could not be exercised, except as the usual attributes of sovereignty were lodged in the territorial governments. Among these is the right to take private property for public use, whenever the public necessities or convenience demand it. “In every political sovereign community,” says Judge Daniel, 6 Howard, 531, “there inheres necessarily the right and duty of

⁵ The statutory requirements of the Condemnation Statute apply only to condemnation by public corporations and state agencies. Many of the early decisions in which the requirements of condemnation law were developed predate the Condemnation Statute and involve condemnation by private corporations. However, these condemnation cases can also be placed within the framework of the Condemnation Statute.

guarding its own existence and of protecting and promoting the interest and welfare of the community at large.”

Swan, supra, at 431-432.

The court, in *People ex rel. Trombley v Humphrey*, 23 Mich 471, 475 (1871), explained that states may take land pursuant to eminent domain “needful to enable them to accomplish the objects for which their governments have been created by their people.”

The *Swan* court had a broad view of the power, stating:

Chancellor Walworth, in 3 Paige R. 73, says this right, denominated the *eminent domain*, “is the highest and most exact idea of property, and remains in the government or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised, not only when the safety, but also when the interest, or even the expediency of the State, is concerned.”

Swan, supra, at 432-433.

The *Swan* court further stated:

These [public] necessities change with the progress of society. That which would have satisfied the public demands a few years since, may perhaps now be wholly inadequate or useless. As new discoveries are made in science and adapted by art to the uses and wants of the community, and its ever-changing condition, laws must adapt themselves to the existing state of things, not arbitrarily, but by natural gradations. . . . [G]overnment must adapt itself to the existing condition and wants of society, or its efficiency is destroyed.

Id. at 438.

According to the *Swan* court, the power of eminent domain “rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise.” *Id.* at 438. *See also, Loomis v Hartz*, 165 Mich 662; 131 NW 85 (1911): “The exercise of such power [of eminent domain] is a matter entirely under control of the

Legislature, subject to such restrictions as are found in the Constitution. The necessity, the occasion, time and manner of its exercise are wholly legislative questions, with the exception just stated.” *Id.* at 665; 131 NW at 86.

In sum, because eminent domain is based upon the sovereign power of the state, it cannot be used for other than a public purpose. It is up to the state legislature to determine the purposes for which eminent domain may be exercised.⁶ As discussed, *infra*, the *Poletown* court relied on the declaration of public purpose in the EDC Act.

2. Necessity

The *Trombley* court emphasized the role of necessity in the exercise of the power of eminent domain, stating:

The authority [of eminent domain] springs from no contract or arrangement between the government and citizen whose property may be appropriated, but it has its foundation in the imperative law of necessity, and is recognized, and may be defended and enforced, upon the ground that no government could perpetuate its existence and further the prosperity of its people, if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals. The right being thus found to rest upon necessity, the power to appropriate in any case must be justified and limited by the necessity.

23 Mich 474. *See also, People ex rel. The Detroit and Howell Railroad Co. v The Township Board of Salem*, 20 Mich 452, 480-481 (1870): “If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need.”; *Ryerson v Brown*, 35 Mich 333, 339

⁶ The power of eminent domain is inherent in states, not municipalities. As this Court explained, “[b]ecause a municipality has no inherent power to condemn property even for public benefit or use, [footnote omitted] the power of eminent domain must be specifically conferred upon the municipality by statute or the constitution, or by necessary implication from delegated authority.” [footnote omitted]. *City of Lansing v Edward Rose Realty, Inc.*,

(1877): “All the authorities require that there should be a necessity for the appropriation in order to supply some public want, or to advance some public policy; the object to be accomplished must be one which otherwise is impracticable.”

The EDC Act at issue in *Poletown*, discussed, *infra*, contains a statement that the taking, transfer, and use of property in an approved project “shall be considered necessary for public purposes and for the benefit of the public.” MCL §125.1622. The EDC Act requires a local determination of necessity as well. Before a project plan can be submitted to the governing body, the local planning agency must determine that “[t]he land included within the project area to be acquired is reasonably necessary to carry out the purpose of the plan and of this act in an efficient and economically satisfactory manner.” MCL §125.1609(1)(c). Accordingly, takings pursuant to the EDC Act have undergone a rigorous examination in order to ensure compliance with the requirement that the taking be necessary.

3. Public Use or Benefit

Poletown was not the first Michigan case to address the issue of private company involvement in connection with eminent domain. In fact, the very early decisions, discussed, *infra*, took place in the context of statutes granting private companies, such as railroads, mills, and cemetery corporations, the right to condemn land. This Court recognized early on that private companies are often integral to fulfillment of a public purpose. The *Swan* court, speaking of benefits derived by railroad companies which had been granted the power of condemnation, stated:

Nor can it be said that property when taken is not used for the public, but by the corporators for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a

442 Mich 626, 631-632; 502 NW2d 638, 641 (1993).

view to private emolument on the part of the corporators, but it is none the less true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service. If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private medium, or by delegated authority; yet all past history tells us that governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. *Swan, supra*, at 436.

The concern of Michigan courts in early cases involving an element of private benefit, often couched in terms of public use and public control, was that the public benefit would be incidental to the private benefit. The court in *Ryerson, supra*, addressed the constitutionality of a statute which allowed private mill owners to condemn land for dams needed to power mills to grind grain. The *Ryerson* court was concerned that the legislation had no controls to ensure public benefit from the mill. The court said of the statute:

The statute appears to have been drawn with studious care to avoid any requirement that the person availing himself of its provisions shall consult any interest except his own, and it therefore seems perfectly manifest that when a public use is spoken of in this statute nothing further is intended than that the use shall be one that, in the opinion of the commission or jury, will in some manner advance the public interest. But incidentally every lawful business does this. *Ryerson, supra*, at 338-339.

Similarly, in *Van Hoesen, supra*, the court expressed concern that land taken by rural cemetery corporations would not be available to the general public for burial but would only be available to a select group of individuals. *Van Hoesen, supra*, at 541; 49 NW at 897. Yet, the *Van Hoesen* court did not preclude a finding of public use or benefit in every case where there was private benefit. The *Van Hoesen* court explained the concept of public use where there is private involvement, employing terms such as “use,” “accommodation,” and “interest” interchangeably:

In Ryerson v. Brown, 35 Mich. 333, the Court says that, in authorizing condemnation proceedings, it is essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodation; that property can never be condemned for private improvements, except where they belong to a class that cannot usually exist without the exercise of that power, and where the public welfare requires that they shall be encouraged.

The exercise of the right of eminent domain is limited to cases where the public have an interest. Cody v. Rider, 1 S. W. Rep. (Ky.) 2. *Id.* at 537; 49 NW at 895.

The early Michigan cases cited above addressed public use in the context of statutes which delegated the power of condemnation to certain types of corporations rather than to local governments. These cases determined the constitutionality of takings by those corporations. *See also, Lakehead Pipe Line, supra.* It is therefore not surprising that the decisions speak in terms of post-condemnation public use and public control. There was no mechanism in such statutes, such as that contained in the EDC Act, for pre-condemnation public input to ensure public benefit. Despite the different terminology, a careful reading of these cases indicates that the concern of the court was that there be public and not merely private benefit. Professor Ross, writing shortly after the *Poletown* decision, interpreted the principle behind the language in the same way, stating, “[T]he essence of public use is public benefit.” Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 361-362 (1983).

The *Poletown* decision had its genesis in the context of governmental rather than private power to condemn. As discussed, *infra*, the EDC Act permits condemnation only after multiple determinations of public benefit have been made by governmental entities, following receipt of public input. Because of this difference in condemnation procedure, the language of *Poletown* differs somewhat from that of early Michigan decisions concerning

condemnation by private corporations. However, in *Poletown*, as in the Michigan cases before it where there was a measure of private benefit, the analysis is the same. Once public purpose has been established by statute, the analysis shifts to determine if the public purpose is truly being served through a showing of predominant public benefit despite incidental private benefit. This is the meaning of *Poletown*'s "heightened scrutiny." In order for the court to determine that the public purpose, as declared by the legislature, is being served when "the condemnation power is exercised in a way that benefits specific and identifiable private interests," the court must find that the public benefit is "clear and significant" rather than "speculative and marginal." *Id.* at 634-635; 304 NW2d 459-460.

B. The *Poletown* Decision

The *Poletown* court did not change the law of eminent domain in Michigan. The court merely applied existing principles in the context of a new statute. The *Poletown* decision is tangible evidence of a recognition by this Court of how, in the words of the *Swan* court, public "necessities change with the progress of society." *Swan, supra*, at 438. Professor Ross provides an excellent summary of how *Poletown* fits within the principles of prior eminent domain law:

Regardless of the validity of his distinctions between the *Poletown* taking and other private-transferee takings, Justice Ryan was correct in one sense: the *Poletown* taking was unprecedented. Yet, the railroad, slum-clearance, and *Poletown* takings share one common characteristic: their justification. In each taking, the state employed eminent domain to assist an essentially private enterprise achieve a societally desired result. [footnote omitted]. For example, railroads provided transportation, communication, a vehicle for society's 'manifest destiny.' [footnote omitted]. The more recent examples of slum clearance and urban redevelopment were designed to reduce crime rates and increase tax bases. [footnote omitted]. Similarly, Detroit's political leaders believed the new automobile plant resulting from the *Poletown* taking would create the jobs and tax revenues necessary to keep the city fiscally sound. [footnote omitted]. These leaders believed that Detroit needed the automobile

plant in the same way society needed the railroad; not as an end in itself but as a means to a desired public benefit.⁷ Ross, *supra*, at 368

In the *Poletown* case, the need for a legislative determination of “public necessities” mandated by *Swan, supra*, was fulfilled by the EDC Act. That act is discussed, *infra*. The EDC Act, pursuant to which condemnation was authorized, fulfilled the requirement of *Trombley, supra*, that condemnation be used to “accomplish the objects for which their governments have been created.” The *Poletown* court quoted and relied upon the recitation of public purpose and necessity found in Section 2 of the EDC Act. Among the needs addressed by the EDC Act is the “continuing need for programs to alleviate and prevent conditions of unemployment,” with the resulting necessity “to assist and retain local industrial and commercial enterprises to strengthen and revitalize the economy of this state and its municipalities” and “to provide means and methods for the encouragement and assistance of industrial and commercial enterprises in locating, purchasing, constructing, reconstructing, modernizing, improving, maintaining, repairing, furnishing, equipping and expanding in this state and in its municipalities.” MCL §125.1602. The section concludes with the statement, “Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities.” *Poletown, supra*, at 631; 304 NW2d at 458.

The *Poletown* court’s “heightened scrutiny” in the face of admitted private as well as public benefit enabled the court to determine if the taking was necessary and involved public benefit, as required by *Trombley, Van Hoesen, Detroit and Howell Railroad Co., Ryerson,*

⁷ Professor Ross did not address the fact that the actions in *Poletown* were undertaken pursuant to a state statute. His emphasis on local decision making, however, does not

and *Swan, supra*. Echoing the sentiment of *Ryerson, supra*, that the project have more than just the general public benefit inherent in any business, the *Poletown* court stated:

Our determination that this project falls within the public purpose, as stated by the Legislature, does not mean that every condemnation proposed by an economic development corporation will meet similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. If the public purpose was not so clear and significant, we would hesitate to sanction approval of such a project. *Poletown, supra*, at 634; 304 NW2d at 459.

The *Poletown* court addressed the requirement of *Trombley, Detroit and Howell Railroad Co.*, and *Ryerson* that the need be imperative and that eminent domain be used when the necessity of public good is otherwise impractical. In holding the taking for the proposed project constitutional, the *Poletown* court cited the City of Detroit's "substantial evidence of the severe economic conditions facing the residents of the city and the state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate available sites to implement the project." *Id.* at 633; 304 NW2d at 459. The *Poletown* court, after stating "[s]uch public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purposes stated by the legislature," went on to hold "this project is warranted on the basis that its significance for the people of Detroit and the state has been demonstrated." *Id.* at 635; 304 NW2d at 460.

The public benefit or use requirement cited by *Swan, Ryerson*, and *Van Hoesen* was fulfilled through determinations and findings made in accordance with the structure imposed by the EDC Act, characterized by the *Poletown* court as "a part of the comprehensive

undercut the essential argument that *Poletown* applied existing legal concepts in the face of changing societal needs.

legislation dealing with planning, housing and zoning whereby the State of Michigan is attempting to provide for the general health, safety, and welfare through alleviating unemployment, providing economic assistance to industry, assisting the rehabilitation of blighted areas, and fostering urban redevelopment.” *Id.* at 630; 304 NW2d at 458.

Because condemnation was undertaken by the City of Detroit pursuant to the EDC Act rather than by General Motors, the concerns expressed in *Swan*, *Ryerson*, and *Van Hoesen* regarding public use were addressed by the determinations required under the EDC Act prior to the authorization of condemnation by the Detroit Common Council. A statute such as the EDC Act is the equivalent of post-condemnation government regulation of railroads, mills, oil pipeline companies, and other privately-owned companies with condemnation powers.

It allows Michigan law to ensure public use or benefit before the condemnation is approved by the municipality. As notions of public purpose change over time, application of related concepts of public use and benefit must change as well. Assisted by the context of the EDC Act’s statutory framework, the *Poletown* court applied the traditional concepts of public use and benefit to the newly articulated public purposes of alleviating unemployment and economic revitalization found in the EDC Act.

Defendants-Appellants and some of the *amicus curiae* insist that *Poletown*’s interpretation of Const 1963, art 10, §2 was incorrect in light of the meaning of “public use” at the time of the writing of the U.S. Constitution and the adoption of the Northwest Ordinance in 1787. This assertion ignores the fact that *Poletown* interpreted the constitutionality of a statute under Michigan’s 1963 Constitution and therefore must be judged in terms of how “public use” was viewed when that constitution was drafted, not in 1787.

The concept of “public use” had evolved in both Michigan and federal constitutional interpretation since 1787. By 1963, the essence of public use, public benefit, had become more pronounced as the needs of society changed and condemnation was exercised more by public bodies than by private corporations. The *Poletown* court decided that case in the context of prior decisions of both the Michigan Supreme Court and the U.S. Supreme Court approving condemnation of land not just for railroads, cemeteries, and mills, but for clearance of blighted land and subsequent transfer of such land to a private party for redevelopment. See *In re Slum Clearance in the City of Detroit*, 331 Mich 714; 50 NW2d 340 (1951), *infra*, and *Berman*, *supra*. While Justices Fitzgerald and Ryan thought that reliance on the slum clearance cases was misplaced in *Poletown*, the fact remains that those cases show that the concepts of public use or benefit had evolved beyond what was even contemplated in the agrarian society of 1787. *Poletown*, *supra*, at 640; 304 NW2d at 462 (Fitzgerald, J., dissenting); *Id.* at 672; 304 NW2d at 477 (Ryan, J., dissenting). Therefore, the fact that the *Poletown* court, in construing the constitutionality of a statute adopted in 1975, carefully built upon the work of prior decisions in existence at the time Michigan’s 1963 Constitution was adopted, was wholly appropriate.

While *Poletown* followed the basic principles set forth in Michigan jurisprudence regarding the use of eminent domain, the decision is properly read as addressing those principles within the context of a constitutional due process challenge to state legislation. The “*Poletown* public purpose test” is commonly summarized as requiring application of heightened judicial scrutiny whenever it appears that a private party benefits from condemnation. However, the facts and circumstances of the *Poletown* case support a much narrower and more specific reading. Of significance to the *Poletown* decision were the

following four elements:

1. State legislation declared a public purpose and provided a comprehensive legislative framework to fulfill that public purpose.
2. Local actions were taken pursuant to the state legislation, including a local determination of public purpose and necessity and adherence to statutory procedures specified in the EDC Act before the project was approved.
3. The court, after reviewing evidence, found a “clear and significant” benefit to the public from the project despite the presence of incidental private benefit.

Courts have not always articulated these elements. However, if one examines both pre-*Poletown* and post-*Poletown* decisions, one finds that the result is generally based upon the presence or absence of these factors, whether or not the case arises in the context of a due process challenge to state legislation. The decisions will be discussed, *infra*, under the captions “Pre-*Poletown* Applications of Public Purpose Test” and “Post-*Poletown* Applications of Public Purpose Test.” An analysis of these cases demonstrates that *Poletown* did not up-end Michigan condemnation jurisprudence, but merely continued principles found in prior decisions of this Court.

C. The EDC Act and Similar Statutes

1. EDC Act

The *Poletown* court did not approve a particular condemnation action based upon a single *ad hoc* determination of a single public body. Rather, the *Poletown* decision upheld the constitutionality of the EDC Act as well as the particular actions taken pursuant to that act. An understanding of the EDC Act is therefore critical to an understanding of the *Poletown* decision. The EDC Act contains state legislative findings of necessity and public purpose,

discussed, *supra*, and provides a rigorous procedural framework which must be followed before condemnation is allowed. The *Poletown* decision, made in the context of the EDC Act, addresses the concerns articulated by *Swan*, *Ryerson*, *Van Hoesen*, *Trombley*, and *Detroit and Howell Railroad Co.*, *supra*, regarding the need for public purpose, necessity, and public use or benefit.

Public involvement is critical to the EDC Act. The EDC Act requires that the governing body of the municipality creating an economic development corporation (“EDC”) approve the application to form the EDC (MCL §125.1604), approve the EDC board (MCL §125.1604), approve a project area adopted by the EDC (MCL §125.1608), and approve a project plan adopted by the EDC (MCL §125.1608). The governing body of the municipality may only approve the project plan after holding a public hearing, after the provision of statutorily prescribed notice, if it determines that the project plan constitutes a public purpose. MCL §125.1610. Condemnation is only authorized for a project that has received the foregoing approvals. MCL §125.1622.

In addition to approval by the EDC board, the local planning agency must recommend the project plan before the governing body of the municipality can approve it. MCL §125.1608. As discussed, *supra*, before making its recommendation, the local planning agency must conclude that the land included within the project area is reasonably necessary for the project. MCL §125.1609(1)(c). The contents of the project plan are specified in the EDC Act. They include, among other things, a list of the persons who will manage or be associated with the management of the project for at least its first year; designation of the person or persons to whom the project is to be leased, sold or conveyed and for whose benefit it is being undertaken; estimates of the number of persons residing in the project area to be

displaced; and a plan of compliance with a relocation assistance statute. MCL §125.1608.

The EDC Act also authorizes the formation by the governing body of a project citizens district council of project area residents and business owners, as an advisory board, after approval of the project area. MCL §125.1612(3).

2. Other Similar Statutes

The EDC Act was not an aberrant piece of legislation enacted by a singular legislature. Rather, it was the first of five statutes enacted by the Michigan Legislature from 1974 through 1996, for the express purpose of addressing unemployment and urban deterioration and encouraging economic development and revitalization. Adoption of the EDC Act in 1974 was followed by the adoption of the Downtown Development Authority Act in 1975, MCL §125.1651 *et seq.* (the “DDA Act”), the Tax Increment Finance Authority Act in 1980, MCL §125.1801 *et seq.* (the “TIFA Act”); the Local Development Finance Authority Act in 1986, MCL §125.2151 *et seq.* (“LDFA Act”); and the Brownfield Redevelopment Financing Act in 1996, MCL §125.2651 *et seq.* (the “Brownfield Redevelopment Act”).

Each of the statutes establishes a comprehensive framework for the creation by a municipality of an instrumentality, such as the EDC described, *supra*, and for that instrumentality to engage in certain specific activities in furtherance of its legislatively declared public purpose. In each of these statutes, the municipality which forms the instrumentality is authorized to condemn property for transfer to the instrumentality for its use in an approved project. Each of these statutes contains the statement that “the taking, transfer, and use shall be considered necessary for public purposes and for the benefit of the public.” MCL §§125.1622 (EDC Act), 125.1660 (DDA Act), 125.1810 (TIFA Act), 125.2159 (LDFA Act), and 125.2660 (Brownfield Redevelopment Act). In the EDC Act, the

DDA Act, and the TIFA Act, legislative findings of need are detailed in a separate section.

The *Poletown* court upheld the constitutionality of the EDC Act with respect to the power of condemnation in furtherance of its legislatively declared public purposes. Were this Court to overrule *Poletown*, it would, by implication, be invalidating virtually identical condemnation provisions in legislation which, over the course of thirty years, the Michigan Legislature has deemed necessary in furtherance of the public good.

The EDC Act and subsequent economic development statutes build upon the Blighted Area Rehabilitation statute, MCL §125.71 *et seq.*, 344 PA 1945 (the “Blighted Area Act”).

That act, while not providing for the establishment of a separate instrumentality, provides a structure within which municipalities can conduct urban renewal activities. The Blighted Area Act provides authority for land to be condemned by municipalities and subsequently transferred to private corporations for urban redevelopment in accordance with a locally adopted development plan. MCL §§125.75, 125.76. In 1986, the definition of “blighted area” found in MCL §125.72(a) was amended to encompass the early stages of blight, thereby enabling municipalities to take action to prevent blight.

The statutes discussed, *supra*, authorizing condemnation for a public purpose and subsequent transfer of the condemned property to a private party to fulfill that purpose, evidence expansion of the concepts of public purpose, necessity, and public use or benefit by the Michigan Legislature since 1945. The Blighted Area Act moved eminent domain involving private corporations well beyond railroads, cemeteries, mills, and oil pipelines, to encompass elimination of physical blight. In 1975, the EDC Act expanded this concept to economic blight and deterioration. The DDA Act, TIFA Act, LDFA Act, Brownfield Redevelopment Act, and amendment to the Blighted Area Act continued this expansive trend.

D. Pre-*Poletown* Applications of Public Purpose Test

While the terminology used by courts has changed since this Court first addressed the constitutionality of condemnation involving a degree of private benefit, pre-*Poletown* decisions looked at the same factors as did the court in *Poletown*: public purpose, necessity, and public use or benefit. Despite sometimes different terminology, the decisions are consistent with the *Poletown* court's analysis.

In *Lakehead Pipe Line, supra*, and *Slum Clearance, supra*, condemnation was upheld based upon reasoning similar to *Poletown*. In *Lakehead Pipe Line, supra*, a state statute had delegated the right of eminent domain to oil pipeline companies in order to build pipelines necessary for the transportation of oil. This court saw no reason to invalidate the legislation due to the incidental benefit the oil company would receive because "the legislature of Michigan did not undertake to authorize condemnation proceedings other than for a public use benefiting the people of the State of Michigan. That was the basis for the legislative action." *Lakehead Pipe Line, supra*, 340 Mich 37; 64 NW2d at 910.

In *Slum Clearance, supra*, this Court upheld a condemnation proceeding pursuant to a slum clearance statute that permitted the condemned property to be sold for redevelopment to private parties. The Court neatly distinguished between public purpose and incidental private benefit, stating:

It seems to us that the public purpose of slum clearance is in any event the one *controlling* purpose of the condemnation.

In the instant case, the resale [abating part of the cost of clearance] is not a primary purpose and is incidental and ancillary to the primary and real purpose of clearance. Reconstruction was asked for in the petition and resale is necessary for such purpose, but the resale is not for the purpose of enabling the city nor any private owner to make a profit. *Slum Clearance, supra*, 331 Mich at 720; 50 NW2d at 343.

The *Shum Clearance* court distinguished the statute involved in the case before it from the dual purpose statute addressed in *Berrien Springs Water Power Co. v Berrien Circuit Judge*, 133 Mich 48; 94 NW 379 (1903), discussed, *infra*.

In *Berrien Springs Water Power Co., Ryerson, and Shizas v City of Detroit*, 333 Mich 44; 52 NW2d 589 (1952), this Court struck down the condemnation actions at issue, but still looked at the same factors as did the *Poletown* court.

In *Berrien Springs Water Power Co., supra*, the plaintiff, acting pursuant to state statute, sought to condemn land in order to build a dam across the St. Joseph River for purposes of both improving navigation for a transportation business and obtaining water power for commercial purposes. Condemnation for transportation purposes was treated as a public use, akin to railroads, in the statute. *Id.* at 50; 94 NW at 380. In striking down the law as unconstitutional, the court found no evidence of public benefit in that portion of the law authorizing condemnation to increase water power, stating: "The taking is not limited to what is required by the public necessities in the improvement of the navigability of the stream, and the law contains no provision by which the taking can be limited to such public necessities." *Id.* at 53; 94 NW at 381.

The constitutional problem resulted from the ability to condemn land solely to increase water power for commercial purposes. Such a condemnation served no public purpose and was therefore unconstitutional. The possibility of private benefit from increased water power as a result of actions taken for the purpose of improving navigation did not trouble the court. This was because the purpose of the condemnation, improved navigation, was a public purpose. In such a case, the court would have found no constitutional infirmity,

“for land can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally served.” [citations omitted]. *Id.* at 54; 94 NW at 381.

The *Poletown* court applied the same reasoning as did the *Berrien Springs Water Power Co.* court but, due to the presence of legislative findings of public purpose in the statutory authority, found the condemnation constitutional. Therefore, despite the presence of incidental private benefit, it passed constitutional muster. In *Berrien Springs Water Power Co.*, that part of the statute authorizing condemnation for commercial purposes contained no statement of public purpose. Therefore, the private benefit was not merely incidental to a public purpose, but was deemed to be the main purpose itself.

In *Ryerson, supra*, the condemnation was sought by a mill owner under an 1865 statute, which allowed mill owners to create dams requiring them to condemn the property of others in order to generate water flow sufficient to power the mill. *Ryerson, supra*, at 333. The statute, according to the court, was a departure from existing law. Yet, “[t]he adoption of the act of 1865 was not preceded by public discussions presenting its necessity, as would naturally have been expected when so great a change in the policy of the law was to be inaugurated.” *Id.* at 334. In addition, the court found no public use or benefit, stating, “there is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use.” *Id.* at 338.

In contrast, the EDC Act at issue in *Poletown*, described *supra*, contained specific findings of necessity and established a system of multiple local determinations and hearings to ensure public benefit. The prescribed procedures of the EDC Act, which had been followed by the Detroit EDC, together with local evidence of need and public purpose, enabled the

Poletown court to conclude that the private benefit to General Motors was incidental. *Poletown, supra*, at 633-634; 304 NW2d 459. With no declaration of public purpose, finding of necessity or anything in the 1865 Act that provided for more than the general public benefit offered by any private business, the *Ryerson* court was unable to uphold the constitutionality of the statute. *Ryerson, supra*, at 342.

In *Shizas, supra*, this Court held unconstitutional a state statute that authorized cities to acquire and operate automobile parking facilities for the use of the public. The statute allowed space on the basement and ground floors, up to 25% of the total garage area, to be used for unrelated retail business. In holding the law unconstitutional, the court was influenced by the lack of a statement of necessity for the retail space, which was totally unrelated to parking. *Id.* at 49; 52 NW2d at 591. The court declined to find the retail space incidental to the parking merely because it could constitute no more than 25% of the space. The *Shizas* court cited the cases of other states for the principle that ““Where, however, the intention to confer a private use or benefit forms *the purpose or part of the purpose* of the proceeding or taking, the power of eminent domain may not be exercised.”” *Id.* at 54; 52 NW2d at 594. [citations omitted].

Poletown is easily distinguished from *Shizas*. In *Shizas*, private benefit formed part of the purpose of the statute; no other explanation was offered for the retail space. In *Poletown*, private benefit was not the purpose of the EDC Act or the condemnation the City of Detroit sought pursuant to that act. Private benefit was an incidental byproduct of actions taken to fulfill the legislatively determined public purpose of alleviating unemployment and fostering economic revitalization.

In sum, pre-*Poletown* cases where the court invalidated condemnation involving a

degree of private benefit were decided in an environment very different from *Poletown*. In such cases, the legislature had made no declaration of public purpose nor a finding of necessity for the proposed action, and there was either no benefit to the general public beyond the benefit provided by any business or there was a predominance of private over public benefit. The *Poletown* decision had none of these infirmities. It relied on an explicit declaration of public purpose and necessity in the EDC Act and it relied on strong evidence of substantial public benefit despite incidental private benefit, and the necessity for taking the property in question.

E. Post-*Poletown* Applications of Public Purpose Test

Condemnation actions undertaken in furtherance of a state legislative enactment have generally been analyzed in an appropriate manner in accordance with *Poletown*. In 2001, this Court decided *Tolksdorf v Griffith, supra*, a case under the Opening of Private Roads and Temporary Highways Act (the “Private Roads Act”), MCL §229.1 *et seq.* The Private Roads Act allowed a private land owner to petition the township supervisor to open a private road across another landowner’s property. A jury of property owners was to determine the necessity of the road and, if necessary, to set compensation for the taking. The court held the act unconstitutional. In contrast to the *Poletown* court’s findings, the *Tolksdorf* court found neither a statement of public purpose in the Private Roads Act nor a public interest that predominated over the private interest to the landlocked property owner who would be benefited by the road. *Tolksdorf, supra*, at 8-9; 626 NW2d at 168.

In *City of Detroit v Vavro*, 177 Mich App 682; 442 NW2d 730 (1989) and *City of Detroit v Lucas*, 180 Mich App 47; 446 NW2d 596 (1989) the Michigan Court of Appeals applied the *Poletown* decision without detailed analysis as to how each of *Poletown*’s

elements was fulfilled. It is therefore difficult to say if *Poletown* was appropriately applied.

Vavro concerned a situation similar to *Poletown*, where the City of Detroit condemned property under the EDC Act, which was to be transferred to Chrysler Corporation to build an assembly plant. The court reluctantly approved the condemnation based upon the *Poletown* precedent. *Vavro, supra*, at 732; 442 NW2d at 687. However, the opinion did not address why condemnation of the particular property at issue was necessary to achieve the project nor did it specifically address why private benefit was merely incidental to that of the public. Given the court's reluctance to allow the condemnation, the fact that it felt compelled to follow *Poletown* is likely the result of findings, albeit unstated, of necessity and predominance of public over private benefit.

Lucas concerned condemnation by the City of Detroit under the DDA Act for the Detroit DDA's Theatre District Project. The condemnation in that case was upheld on procedural grounds. *Lucas, supra*, at 49; 446 NW2d at 597. However, in *dicta*, the Court of Appeals addressed some of the issues raised in *Poletown*, finding public purpose in the DDA Act and necessity for the particular property. Perhaps because the court decided the case on procedural grounds, the court did not engage in "heightened scrutiny" and address the relative public and private benefit.

On its face, *Poletown* addressed the constitutionality of the EDC Act. Nevertheless, Michigan courts, including the Court of Appeals in *Hathcock*, have elected to apply *Poletown's* analysis in situations other than a challenge to a state statute. These cases involve condemnation of private property for a public purpose where a private enterprise benefited from the taking. An examination of the cases indicates that for the most part they are consistent with *Poletown's* general principles. Rather than using *Poletown* to trample upon

private property rights as Justice Ryan had feared, these cases have authorized condemnation in only a narrow set of circumstances.

In cases where the condemnation is authorized pursuant to a local determination of purpose and necessity rather than a state statute, Michigan courts, with the exception of *Hathcock*, have been loath to endorse the action. Although *Poletown*, which determined the constitutionality of a state statute, was not binding in those cases, courts have sought guidance in its principles.

In *City of Lansing v Edward Rose Realty, Inc.*, 442 Mich 626; 502 NW2d 638 (1993), this Court reviewed a City of Lansing ordinance providing for mandatory access to private property by the city's cable franchisee. The ordinance declared mandatory access to "constitute both a public use and public purpose," *Id.* at 630; 502 NW2d at 641. In contrast to *Poletown*, where the authority to condemn was based upon a state statute explicitly addressing the subject matter, the City of Lansing had enacted its condemnation ordinance under authority of the Condemnation Statute and the Home Rule Cities Act, MCL §117.1 *et seq.*, a statute of general applicability. Denying the city the right to authorize mandatory access and thereby effect a taking, the *Edward Rose Realty* court emphasized the lack of explicit statutory authority and related declaration of public purpose, stating:

The cited enabling statutes, however, do not specifically authorize the takings in the present case. There is no state statute identifying as a public use or purpose the mandatory access onto private property by a city-franchised cable television provider. Ordinances passed under such general authority are open to inquiry by the courts and, in order to be held valid, must be reasonable and not oppressive. [footnote omitted]. Powers implied by general delegations of authority must be "essential or indispensable to the accomplishment to the objects and purposes of the municipality." [footnote omitted]. *Id.* at 633-634; 502 NW2d at 642.

Judicial deference to a local statement of public purpose was below that accorded a

similar statement by a state legislature, according to the *Edward Rose Realty* court. The court stated:

The Michigan Legislature has not enunciated as a general public purpose that city-franchised cable operators have mandatory access to all rental properties. There is no extensive regulation of the industry or any legislative pronouncement of the public benefits of the franchised cable services as in New York and New Jersey. [footnote omitted]. . . Judicial deference granted state legislative determinations of public use [footnote omitted] is not similarly employed when reviewing determinations of public purpose by a municipality pursuant to broad, general enabling statutes. *Id.* at 637; 502 NW2d at 644.

While the *Edward Rose Realty* court characterized what it was doing in terms of *Poletown's* "heightened scrutiny," this scrutiny was applied not only to the mechanism of achieving the public purpose, but also to the public purpose itself. The court stated:

Hence, where a proposed government action confers a benefit on a private interest, unless that benefit is merely incidental, a reviewing court will inspect with heightened scrutiny the assertion by the governmental entity of a public purpose. *Edward Rose Realty, supra*, 442 Mich at 639; 502 NW2d at 645.

Because there had been no "determination by the Legislature that the city's proposed action serves an essential public purpose," the court next scrutinized the degree of public and private benefit. *Id.* In light of the "extensive private interest" of the cable franchisee, the court found the purposes asserted in the ordinance to be insufficient to overcome the private property owner's right to exclude others from its property. *Id.* at 641; 502 NW2d at 641-642.

Where condemnation is not undertaken pursuant to state statutory authority containing an explicit declaration of public purpose for the taking, *Edward Rose Realty* sets the bar very high before a taking involving an element of private benefit can be found constitutional. The court must determine (1) that the condemnation serves an essential public purpose and (2) that the benefit to the public is clear and significant. *Edward Rose Realty, supra*, at 633-634, 639;

502 NW2d at 642, 645. In contrast, the *Poletown* court had to apply only the second part of the test. The EDC Act had already addressed the first part. While these two prongs are not necessarily analyzed separately, the result is that under *Edward Rose Realty* there is a very high threshold for justifying condemnation involving private benefit where the taking is not explicitly authorized pursuant to a comprehensive statutory framework, such as the EDC Act.

The Michigan Court of Appeals has also applied the principles of *Poletown* in several cases where condemnation was sought pursuant to general municipal powers rather than a specific statute, such as the EDC Act. *Poletown*, even if not directly applicable, did not lead to an abrogation of property rights in favor of corporate interests.

In *City of Center Line v Chmelko*, 164 Mich App 251; 416 NW2d 401 (1987), which predated *Edward Rose Realty*, the City of Center Line had condemned property in the downtown area pursuant to authority granted in its zoning ordinance. The city characterized the taking as necessary to address a parking shortage and eliminate blighted property. The property was then to be conveyed to an automobile dealer considered vital to the overall well-being of the city's downtown. Evidence reviewed by the *Chmelko* court, however, revealed that the parking shortage existed in theory but not in fact, the planned use of the property would not increase parking, and that the "blighted property" was old, but well-maintained. The real reason for the taking was improving the general economic viability of the city's commercial district. *Id.* at 256; 416 NW2d at 404. The *Chmelko* court, while acknowledging that deference is typically given to legislative determinations of public purpose, appropriately distinguished its factual situation from that of *Poletown*. It narrowly read the *Poletown* decision:

We read the factual context of *Poletown* as extremely significant to the

holding in that case. We do not take *Poletown* to be a complete repudiation of the judiciary's *ultimate* power to review a city council's determination of public purpose. Rather, we believe the situation illuminates the deference which must be accorded the state Legislature in the context in the Economic Development Corporations Act. *Chmelko, supra*, at 261; 446 NW2d at 406.

The court went on to apply heightened scrutiny and, based on the evidence, found "no 'substantial proof' that the public is to be primarily benefited. In fact, the primary beneficiary will be Rinke Toyota. The public's interest is marginal or, indeed, speculative. We therefore conclude that the city's determination does not pass heightened judicial scrutiny under the standard of *Poletown*." *Id.* at 262-263; 164 NW2d 406-407.

In 2002, the Michigan Court of Appeals decided *City of Novi v Robert Adell Children's Funded Trust*, 253 Mich App 330; 659 NW2d 615 (2002). That case, like *Edward Rose Realty, supra*, concerned condemnation under authority of the Home Rule Cities Act. The City of Novi sought to condemn property for two roads, one of which was to serve as an industrial spur to a private corporation. The second road to be built on the condemned property would have more general public use as a bypass of a congested intersection. The court declined to follow the city's reasoning that road construction is inherently a public purpose and found no statutory declaration of public purpose or necessity in the Home Rule Cities Act. 253 Mich App at 348; 659 NW2d at 625. Having no legislative determination of public purpose, the *Adell Trust* court sought guidance in determining public purpose/public use,⁸ in Justice Ryan's *Poletown* dissent. The *Adell Trust* court examined the facts of the case before it in light of the "instrumentality of commerce" test cited by Justice Ryan, the only situation where Justice Ryan determined that public use

had been found in the presence of private benefit. *Adell Trust, supra* at 343; 659 NW2d at 623, citing *Poletown, supra*, at 674-681; 304 NW2d at 477-480 (Ryan, J., dissenting). Condemnation for the industrial spur did not meet the requisites of this test. *Adell Trust, supra*, at 353; 659 NW2d at 627.

Where private benefit is involved, the instrumentality of commerce test finds a public use only where there is a public necessity of an extreme sort, ongoing public control of the use of land after transfer to the private entity, and selection of land according to facts of independent public significance. *Adell Trust*, 253 Mich App at 352; 659 NW2d at 627. The Court of Appeals need not have used the instrumentality of commerce test if it had wanted to prohibit the taking for the industrial spur. While the *Adell Trust* court did cite *Edward Rose Realty*, the court could have used the test developed in *Edward Rose Realty* as the sole basis for its decision. Condemnation for the industrial spur would have failed under application of *Edward Rose Realty* because it did not fulfill an essential governmental purpose and because there was no clear and significant public benefit, particularly in light of the substantial private benefit.

If the instrumentality of commerce test, as described by Justice Ryan in *Poletown* and by the *Adell Trust* court, were to be adopted as the sole basis for allowing condemnation where a private use or benefit is involved, the use of condemnation would be so limited that condemnation could not be used for many of the public purposes defined by the state legislature. Even the slum clearance cases to which Justice Ryan did not object would be prohibited under such a narrow test, because of the lack of ongoing public control. *Poletown*,

⁸The *Adell Trust* court used the term “public purpose/public use” in keeping with the *Poletown* court’s equation of these terms. *Adell Trust, supra*, 253 Mich at 343; 659 NW2d

supra, at 640; 304 NW2d at 462 (Ryan, J., dissenting). In addition, the “instrumentality of commerce” test was based on cases such as *Ryerson*, *Swan*, and *Van Hoesen*, discussed, *supra*, which decided the constitutionality of condemnation actions taken by private corporations, not by public bodies, as is required under the EDC Act at issue in *Poletown*. The need for public control after condemnation in such a situation was addressed by the pre-condemnation public input and determinations critical to the EDC Act.

In *Hathcock*, the Court of Appeals also relied on the *Poletown* decision despite the fact that the constitutionality of a state statute was not at issue. The *Hathcock* court upheld condemnation of land for a technology and industrial park near Detroit Metropolitan Wayne County Airport pursuant to a Resolution of Necessity adopted by the Wayne County Commission under the general authority of the Condemnation Statute.⁹ The county had relied upon no comprehensive state statutory framework such as the EDC Act. However, the *Hathcock* court relied on *Poletown* rather than *Edward Rose Realty* because both *Hathcock* and *Poletown* involved the factual similarity of condemning land for the purpose of job creation.

This reliance on *Poletown* rather than *Edward Rose Realty* was misplaced. The common public purpose of job creation in both *Poletown* and *Hathcock* is not the salient variable in terms of analysis under Michigan condemnation law. The salient variable under *Edward Rose Realty* is who declared the public purpose. If the Michigan Legislature has

at 623.

⁹ While the Court of Appeals noted the role of the Federal Aviation Administration’s noise abatement program in the County’s decision to build the Pinnacle Aeropark Project, the Court of Appeals did not address this aspect of public purpose. The possibility that the federal legislation could serve as an alternative public purpose or authority for the County’s condemnation is beyond the scope of this brief.

declared the public purpose, the court, absent a showing that the legislature was acting in an arbitrary and irrational manner, must accept that purpose and must then scrutinize the proposed means of fulfilling that purpose only to make sure it fits within the scope of the purpose. If the purpose has been declared by a local legislative body, the court must scrutinize the purpose as well as the means of fulfilling that purpose.

Because no public purpose for the taking was declared in the state statute used by Wayne County in *Hathcock*, the questions of public purpose should not have been answered under *Poletown*, but under the much more stringent standard adopted by this Court in *Edward Rose Realty*. That standard requires that “[p]owers implied by general delegations of authority must be essential or indispensable to the accomplishment to the objects and purposes of the municipality.” *Edward Rose Realty, supra*, at 633-634; 502 NW2d at 642. The *Hathcock* court did not address this issue. The public benefit must also be “clear and significant” and predominant over the private benefit.¹⁰ *Id.* at 639; 502 NW2d at 645. While the facts of *Hathcock* might ultimately show that the proposed condemnation does meet the appropriate legal standard, the Court of Appeals did not apply that standard. The fact that the Court of Appeals relied on *Poletown* in an inapposite case should not provide cause for this Court to reverse *Poletown*.

The public purpose test of *Poletown* has provided Michigan courts with guidance in assessing whether condemnation can lawfully be used when some private benefit results. The analysis set forth in the *Edward Rose Realty*, *Tolksdorf*, *Chmelko* and, to some extent, *Adell*

¹⁰ While *Edward Rose Realty* concerned the situation where there was an identified private beneficiary and *Hathcock* does not, there is nothing in *Edward Rose Realty* which would lead to the conclusion that identification of a specific beneficiary is critical to the determination of public versus private benefit.

Trust opinions shows that Michigan courts have continued *Poletown*'s practice of permitting the condemnation of private property only when (i) the action is undertaken in furtherance of a public purpose defined by the state legislature, (ii) local action is taken in accordance with statutory requirements, and (iii) where private as well as public benefit is involved, public benefit is clear and significant, and private benefit is incidental. *Poletown* was inappropriately applied by the *Hathcock* court. *Hathcock* is therefore not the proper case in which to determine the continued validity of *Poletown*.

IV. IF *POLETOWN* IS OVERRULED BY A DECISION OF THIS COURT, THAT DECISION SHOULD BE APPLIED PROSPECTIVELY.

For the reasons heretofore stated, the Detroit DDA, the Detroit EDC, and the MDFA do not believe that the *Poletown* decision should be overruled. However, if this Court elects to overrule the *Poletown* decision, the decision of this Court should be applied prospectively only.

According to *Pohutski*, the Supreme Court looks at four factors in assessing where there should be retroactive application, including (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; (3) the effect of retroactivity on the administration of justice; and (4) Whether the decision established a new principle of law. *Pohutski, supra*, at 696; 641 NW2d at 233.

Application of these factors clearly points to prospective application as the only appropriate and practicable course if this Court overrules *Poletown*. Presumably, the purpose in overruling the *Poletown* decision would be enactment of a new rule which states that property cannot be condemned for a public purpose if, at the time of condemnation, there is intent to transfer the property to a private party. Retroactive application of any such rule

would disrupt essential economic preservation and revitalization activities which have been sanctioned for thirty years in Michigan. Because this new rule would be contrary to years of Michigan condemnation jurisprudence, it could also call into question actions commenced under other statutes where a public purpose is served, in part, through the activities of private corporations.

For thirty years, the Detroit EDC, the Detroit DDA, and members of the MDFA have relied on repeated actions of the Michigan Legislature authorizing condemnation for the public purposes of alleviating unemployment, addressing urban deterioration, and fostering economic revitalization. These statutes demonstrate the legislature's realization that, in a capitalist economy such as that of the United States, private involvement is needed in order to achieve those public purposes. Municipalities and the many public instrumentalities created under Michigan law for the purposes set forth above are continually undertaking activities authorized by the EDC Act, the DDA Act, the TIFA Act, the LDFA Act, and the Brownfield Redevelopment Act. It is therefore almost certain that many have approved statutorily authorized project plans, have begun to assemble land in furtherance of those plans, and have issued bonds in anticipation of receiving revenue from the sale of the property or from taxes generated by private use of the land. Retroactive application of any reversal of *Poletown* would undermine these efforts at a time when Michigan is under economic stress and a variety of tools is sorely needed to create and retain jobs and expand economic diversity. Retroactive reversal of *Poletown* would cause many existing projects to remain uncompleted, and could jeopardize the credit ratings of local units of government, thereby creating undue hardship in Michigan's many struggling municipalities. Therefore, should this Court determine that *Poletown* is no longer valid law, such determination should be

prospective only.

CONCLUSION

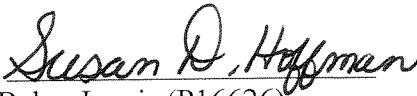
The Michigan Legislature has authorized organizations such as the Detroit EDC, the Detroit DDA, and members of the MDFA to engage in projects requiring condemnation of land for purposes which the legislature explicitly determined to be necessary to public well-being in Michigan. When faced with condemnation actions pursuant to such statutes, the court's role is merely to determine if the legislature's actions meet the low threshold of rationality and whether the proposed actions are within the legislatively declared purpose.

If private property is taken for a public purpose pursuant to a statute, in a situation where fulfillment of that purpose involves later transfer to a private corporation, *Poletown*, following principles going back to the earliest days of Michigan's statehood, requires that the court examine the proposed action carefully in order to ascertain if the public is the primary beneficiary, as the legislature intended. *Poletown* merely applied well-settled principles of law in a new factual situation. Cases following the *Poletown* decision have largely followed its prescriptions carefully. Court have even obtained guidance from *Poletown* in cases addressing other than the narrow issue decided by the *Poletown* court, the constitutionality of a state statute. The fact that *Poletown* has not been applied appropriately in all cases,

including the *Hathcock* case, should not provide reason for this Court to overrule the *Poletown* decision.

Respectfully submitted,

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